STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2011
v	No. 297659 Oakland Circuit Court
MICHAEL PIERRE BROWN, Defendant-Appellant.	LC No. 2009-228699-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for the first-degree premeditated murder conviction, 10 to 40 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions stem from his fatal shooting of Anthony Singleton. Defendant first argues that there was insufficient evidence presented at trial to disprove his claim of self-defense beyond a reasonable doubt. We disagree. In reviewing a claim of insufficiency of the evidence, all factual conflicts must be resolved in a light most favorable to the prosecution. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This Court must "determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* The standard of review is deferential, and all reasonable inferences and credibility choices must be made in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant relies on the Self-Defense Act, MCL 780.971 *et seq.*, which states, in relevant part:

> An individual who has not or *is not engaged in the commission of a crime at the time he or she uses deadly force* may use deadly force against another individual anywhere he or she has the legal right to be *with no duty to retreat* if either of the following applies:

> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972(1)(a) (emphasis added).]

Under the common law, a person is generally required "to avoid the use of deadly force if he can safely and reasonably do so, for example . . . by utilizing an obvious and safe avenue of retreat." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The Self-Defense Act's abrogation of the common-law duty to retreat in certain situations does not apply to defendant because he was engaged in the commission of a crime – felon in possession of a firearm – when he shot Singleton. See MCL 780.972(1). Therefore, defendant's claim of self-defense is governed by Michigan common law, which recognizes a duty to retreat. See *Riddle*, 467 Mich at 119. Once a defendant presents evidence of self-defense, the prosecutor must disprove self-defense beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009). The prosecution can meet its burden by showing that the defendant's belief of imminent danger was either not honest or objectively unreasonable. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Regardless of such a duty to retreat under the common law, however, defendant's argument fails because the prosecution presented evidence showing that defendant did not have an honest or reasonable belief of imminent death or great bodily harm, elements essential to a claim of self-defense.

Bruce Clark testified that when defendant shot Singleton, Singleton was driving away from Kenny Harris's home. Singleton fell out of the passenger door, and an autopsy revealed that Singleton was shot twice in the back. The trajectory of the bullets was consistent with Singleton bending forward when shot. A jury could reasonably interpret this evidence as showing that Singleton was attempting to escape defendant's gunfire and was not reaching for a weapon. More to the point, the fact that Singleton pulled out of the driveway, away from defendant, could lead a reasonable jury to conclude that defendant was not in imminent danger because Singleton was leaving the area. This is consistent with testimony from two other witnesses that defendant claimed to have said "take this with you" before firing. This phrase indicates that defendant knew that Singleton was leaving the scene. Moreover, Clark never saw a weapon on Singleton or in his car before the shooting. If defendant believed that Singleton was leaving with the intent to return with a weapon, as occurred two days before the shooting, defendant had ample opportunity to leave the scene or call the police.

The prosecution also presented evidence from which motive, premeditation and deliberation could be inferred. Melanie Rutherford testified that two days before the shooting, defendant stated, "[Singleton] will be dead by Sunday." She also claimed that defendant "went crazy" after he and Singleton argued that day. She believed that defendant was jealous of Singleton. Though defendant challenges only the sufficiency of the prosecution's evidence regarding his claim of self-defense (not the sufficiency of the elements of first-degree premeditated murder), evidence of motive, premeditation and deliberation further erode defendant's argument. Not only was the jury unconvinced by defendant's claim of self-defense, it also found the killing to be premeditated and deliberate.

Considering all of the evidence in a light most favorable to the prosecution, a reasonable jury could conclude that defendant lacked an honest, reasonable belief that he faced an imminent

threat of death or grave bodily harm. Accordingly, sufficient evidence was presented to establish that he did not act in self-defense.

Defendant next argues that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction regarding imperfect self-defense. We disagree. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing in the trial court, this issue is not preserved for appellate review and our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The prejudice requirement is satisfied when the defendant demonstrates "a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Counsel's performance will be presumed reasonable trial strategy, and the burden is on the defendant to show otherwise. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

The decision to pursue a particular defense theory is a matter of trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Further, an all-or-nothing defense, in which a jury must either acquit or convict the defendant on the charged offense, is a legitimate trial strategy. See *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981).

Defendant has failed to overcome the presumption that counsel's decision to pursue a (perfect) self-defense theory, rather than an imperfect self-defense theory, constituted reasonable trial strategy. Imperfect self-defense is a qualified defense available to a defendant when he would have been entitled to claim (perfect) self-defense but for the fact that he was the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). An imperfect self-defense claim, if successful, will mitigate second-degree murder to voluntary manslaughter. *Id.* While there was testimony regarding the argument between defendant and Singleton immediately before the shooting, it is less than clear who was the initial aggressor. What is beyond dispute is that both men verbally threatened the other before defendant shot Singleton. In closing argument, defense counsel argued that Singleton was the initial aggressor, a theory consistent with (perfect) self-defense. There were facts that supported such an argument: defendant was already present when Singleton arrived at Harris's home, Singleton had pointed an AK-47 rifle at defendant two days earlier, and Clark, the only testifying eyewitness to the shooting itself, did not testify regarding who initiated the confrontation. Based on the evidence presented and the focus of the closing arguments, the critical issue was whether defendant had an honest and reasonable belief that he faced imminent danger that justified the use of deadly force, not whether defendant or Singleton was the initial aggressor.

Further, a (perfect) self-defense theory, if believed by the jury, would have resulted in acquittal. An imperfect self-defense theory, however, even if believed, would only have resulted in mitigating a second-degree murder conviction to voluntary manslaughter. See *Kemp*, 202 Mich App at 323. Defense counsel cannot be faulted for advancing a (perfect) self-defense theory and giving the jury only two options: acquittal or conviction. The decision to proceed

with an all-or-nothing defense is a legitimate trial strategy. See *Rone*, 109 Mich App at 718. Moreover, advancing both an imperfect self-defense and a (perfect) self-defense theory could have created confusion amongst the jurors and caused them to doubt either theory.

Defendant has also failed to establish prejudice because he was convicted of first-degree premeditated murder. This Court has never expressly recognized imperfect self-defense as mitigating first-degree premeditated murder. Likewise, our Supreme Court has never recognized the doctrine as such. See *People v Heflin*, 434 Mich 482, 508; 456 NW2d 10 (1990). Defense counsel was not objectively unreasonable for failing to advance an unsupported legal theory. Although defendant might have had a plausible argument had he been convicted of second-degree murder, he cannot show ineffective assistance of counsel under the circumstances of this case. Ineffective assistance of counsel requires an objectively unreasonable performance that results in prejudice to a defendant. *Pickens*, 446 Mich at 302-303. If defendant had been convicted of second-degree murder, a winning imperfect self-defense theory could have mitigated the offense to voluntary manslaughter. Because defendant advances a theory that has never before applied to first-degree premeditated murder, however, he cannot show that the result of the trial would have been different. *Moorer*, 262 Mich App at 75-76. Therefore, defendant was not denied the effective assistance at trial, and, as such, is not entitled to a new trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens